*Trower* v. *Chadwick*, 3 Bing. N. C. 334; s. c., 3 Scott 699; 8 Id. 1; *Dodd* v. *Holme*, 1 Ad. & E. 393; *Humphreys* v. *Brogden*, 12 Q. B. 739; *Jeffries* v. *Williams*, 5 Exch. 792; *Taylor* v. *Stendall*, 7 Q. B. 634.

At common law, trespassers on land cannot complain of any erection by the owner thereof, whereby they have received injury. This principle was applied in England, before stat. 7 & 8 Geo. 4, c. 18, to the case of a trespasser in a wood in which he knew that there were spring-guns: *Ilott* v. *Wilkes*, 3 B. & Ald. 304. But the trespass must not have been induced by such owner: *Townsend* v. *Watken*, 9 East 277. See *Dean* v. *Clayton*, 7 Taunt. 489; *Bird* v. *Holbrook*, 4 Bing. 728; *Jordin* v. *Crump*, 8 Mees. & W. 782. And persons using for their own benefit land subject to a public easement are liable for all damage happening to others by reason of negligence in such use: *Proctor* v. *Harris*, 4 Car. & P. 337; *Daniels* v. *Potter*, Id. 262; *Drew* v. *N. R. Co.*, 6 Id. 754; *Beatty* v. *Gilmore*, 16 Penna. St. 463. And this principle applies to the occupant of a house with an area on a public street (*Coupland* v. *Hardingham*, 3 Camp. 398; *Barnes* v. *Ward*, 2 Car. & K. 661), and to persons working a quarry near the highway (*Reg.* v. *Mutters*, 11 L. T. N. S. 386); but it must be close to the highway (*Hounsell* v. *Smith*, 7 C. B. N. S. 731), and the plaintiff must have exercised due care (*Irwin* v. *Sprigg*, 6 Gill 200; *Baltimore* v. *Marriott*, 9 Md. 160; *Crommelin* v. *Coxe*, 30 Ala. 318). Perhaps we may include under the same principle the exposure of disgusting and obscene pictures on or near a public place (*Reg.* v. *Gray*, 4 Fost. & Fin. 73), or the doing of anything to gather a large crowd in, and thus obstruct, the highways of a city: *People* v. *Cunningham*, 1 Denio 524; *Baker* v. *Commonwealth*, 19 Penna. St. 412; *State* v. *Buckley*, 5 Harringt. 508.

H. N. S.

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## *District Court of Hamilton County, Ohio.*

### STATE OF OHIO EX REL. EPHRAIM T. BROWN *v.* JOHN RITT AND ANTHONY SHONTEN.

Under the Ohio statute, passed May 3d 1852, "to regulate the election of state and county officers" (3 Curwen's Revised Statutes 1920), after the polls of an election have been once opened "between the hours of six and ten in the morning" in pursuance thereto, they cannot be "closed" for any purpose until six o'clock in the afternoon, without rendering the election illegal and void.

INFORMATION in the nature of a *quo warranto*.

This was a proceeding to contest the legal right of the defendant, John Ritt, to exercise the office of mayor of the village of Mount Airy in the county of Hamilton. It appeared that the relator and the said John Ritt were opposing candidates for said office at the election held on the first Monday of April 1867. Ritt received a majority of the votes cast, and the certificate of

the election was afterwards issued to him by the recorder of the village.

The relator filed an information in the nature of a *quo warranto*, claiming that the election was void by reason of certain irregularities and misconduct on the part of the judges in conducting it, and that, therefore, the old mayor, the defendant Shonter, continued in office. The matter relied on as vitiating the election was the fact that the officers of the election, after the polls had been regularly opened, between the hours of 6 and 10 o'clock, A. M., left the place of voting at about half past 11 o'clock, A. M., taking with them the ballot-box, and returned with it at about half past 1 o'clock, P. M., when the voting was resumed. The answer of the defendant, Ritt, on this point was as follows: "The polls of said election were opened between the hours of 6 and 10 o'clock in the morning and closed at 6 o'clock in the afternoon of the same day, that is, the first Monday of April aforesaid. This defendant admits that the judges and clerks of said election left the place of voting about the usual time for dinner in that neighborhood, and were absent therefrom about one hour, and that meanwhile they deposited the ballot-box in a place of security; but he avers that this was done with the consent and upon the advice of the relator, Ephraim T. Brown, who was then and there a candidate for the office of mayor as aforesaid, and with the consent likewise of all the voters then and there assembled. He denies that said ballot-box was then or at any time during the hours of the election as above stated, out of the custody or possession of the judges; or that by reason of the matters alleged in the information, or any of them, any qualified voter of the village of Mount Airy was prevented from voting or failed to vote on said day and at said election."

There was no misconduct of the judges of the election proved or pretended except that by the consent of all persons present, candidates and electors, they closed the ballot-box, deposited it in a place of safe keeping, and went away to dinner, at about half past 11 o'clock, remaining absent from one to two hours. It did not appear that any elector had been prevented from voting, or that any injury to any one was caused or intended. There was no dispute (after the court had decided in his favor a question upon the Naturalization Act of April 1802, § 4) that John

Ritt had received a majority of all the votes cast, and unless the election itself was totally void, had been elected.

*George E. Pugh*, on behalf of Ritt, did not deny that the action of the judges was irregular, but contended that on *quo warranto* the question, after passing behind the certificate of election, was only which of the claimants had, in fact, the highest number of legal votes. And he insisted that inasmuch as the defendant had proved affirmatively that neither the relator nor any one else had suffered any disadvantage, a mere mistake of duty on the part of the judges could not avoid the election.

Mr. *Hoefer* rose to address the court on behalf of the defendant Shonter, the former mayor, but the court intimated that it was not necessary to offer any argument on that side.

Mr. *Crapsey*, on behalf of the relator, said that under this intimation of the court, he would not offer any remarks.

The opinion of the court was delivered by

BRINKERHOFF, J.—It was correctly stated by Mr. Pugh, as a universal law governing all elections, that, throwing aside mere forms, the only question is, who has received the most legal votes? The point as to the want of the signatures of the judges to the papers touched a mere matter of form. The object was only to authenticate the paper, and it was competent to authenticate by other means, as it was by the oath of the recorder. So also, as to the administration of an oath to the judges. They were sworn as a matter of fact, and acted as judges *de facto*.

It was beyond dispute, however, that for about the space of two hours, the judges and clerk of election left the polls and took the ballot-box away, returning afterwards and resuming the election. There is no pretence that the ballot-box was tampered with, but that the judges rather acted in ignorance of what their duties were.

The court is of opinion that such conduct on the part of the judges goes to the substance of the election, and renders it void *in toto*. The statute prescribes that the polls shall be opened at a given hour in the morning and closed at a given hour in the

afternoon. It was the express design of the legislature that all the time between these hours the polls should be kept open for the convenience of any elector who may chose to present his ballot. The court does not agree with counsel that it lies on the party contesting the election to show affirmatively that the closing the polls influenced the result. The law gives the elector the privilege of consulting his own convenience as to what hour of the day he will visit the polls, and it is a fair presumption that if the polls were temporarily closed for dinner, as was proved, a portion of the electors were deprived of that privilege. The writ was, therefore, well brought against Mr. Ritt, who claimed the majority, but the same state of facts also excludes Mr. Brown, the relator, from the office of mayor.

MURDOCK, COX, and FORCE, JJ., concurred.

In the case of *The Penn District Election*, 2 Pars. (Penna.) 533, where the polls, through mistake of the law by the election officers, were closed at 8 o'clock, instead of 10, in the evening, as required by law, the election was held void. The court laid down no definite rule as to how much of a variation was necessary to make the election void; but PARSONS, J., was of opinion that if an election was closed an hour, or even half an hour, before the time fixed by law it should be set aside, unless it appeared, from an examination of the number of votes compared with the tally-lists, that the number left out could not by possibility change the result.

And where the polls were kept open after the proper hour, if enough votes were cast to change the result, the election must be set aside. A legal voter cannot be interrogated as to whom he voted for, although he voted after the proper time of closing the polls; and therefore the court cannot go into any examination of the votes; it is enough if the votes improperly received could by possibility change the result: *Locust Ward Case*, 4 Penna. Law J. 341.

In Illinois, however, a different rule was laid down, that to make the election void it must be shown that votes were cast after the proper hour for closing the polls which changed the result. It is not enough that the votes thus received, if all of one kind, would change the result: the court will not presume one way or the other, and proof must be made of which side the votes thus cast were for: *Piatt* v. *The People*, 29 Ills. 54.

But an election will not be set aside because the polls were closed at the hour specified by the Act of Assembly, though a number of legal voters who were present and intending to vote were thereby prevented: *Clark's Case*, 2 Pars. (Penna.) 525. J. T. M.